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No. _____

In the

Supreme Court of the United States

October Term, 1997

RICHARDSON C. BELL, Trustee for Bell Land Trust
Petitioner,

v.

CITY OF VIRGINIA BEACH
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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53 pp

QUESTIONS PRESENTED

In 1979, Seawall Enterprises, Inc., a corporation 50% owned by Petitioner and his former wife, acquired two residential lots along the coast in the City of Virginia Beach (City). One year later, the City adopted a sand dune protection ordinance that required a special permit to be obtained in order to develop those lots. In 1992, Petitioner (to whom, along with his wife, the lots had been transferred when Seawall was dissolved in 1982) applied for a development permit under the dune ordinance. After his second application was denied as inconsistent with the ordinance, Petitioner brought an inverse condemnation action against the City. The trial court found that the City's denial of the permit deprived Petitioner of all economically viable use of his property and awarded him just compensation. The Virginia Supreme Court reversed, ruling as a matter of federal law that Petitioner could not have suffered a compensable taking because he had acquired the lots *after* the enactment of the dune ordinance. The questions presented are:

1. May a city avoid the obligation under the Takings Clause to pay just compensation merely because the Plaintiff acquired a parcel of real property after the enactment of the ordinance whose subsequent application deprived that parcel of all economically beneficial and productive use?

2. Is a local sand dune protection ordinance, adopted one year before a parcel of real property is acquired, part of the "background principles" of a state's property and nuisance law with respect to that parcel within the meaning of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-30 (1992).

3. Given that "the prior owner[] must be understood to have transferred [its] full property rights in conveying [a] lot," *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987), does the transfer of a parcel of real property include the transfer of the right to ripen and bring a takings claim at the time when that parcel is deprived of all economically viable use?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Richardson C. Bell, Trustee for Bell Land Trust respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Virginia Supreme Court entered in the above-entitled proceeding on February 27, 1998.

OPINIONS BELOW

This petition regards a decision of the Virginia Supreme Court that is reported as *City of Virginia Beach v. Richardson Bell, Trustee for Bell Land Trust*, 1998 WL 120262 (Va. Feb. 27, 1998), and is reproduced as Appendix (App.) A. This decision reversed a judgment of the Circuit Court of the City of Virginia Beach in *Richardson Bell, Trustee for the Bell Land Trust v. City of Virginia Beach*. This judgment was filed on February 28, 1997, and is reproduced in Appendix B. Page references are to the versions in the appendices.

JURISDICTION

The final decision of the Virginia Supreme Court considered and decided the question of whether an uncompensated taking of all use of private property constituted a violation of the Fifth Amendment to the United States Constitution. On May 12, 1998, this Court granted Petitioner's request, pursuant to this Court's Rule 13.5, for an extension of time to file this petition so that this petition is due on June 27, 1998. This petition for writ of certiorari is thus timely filed in accordance with Rule 13 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1603(a) of the Virginia Beach Code states:

> Any person who desires to use or alter any coastal primary sand dune within this city, other than for the purpose of conducting the activities specified in section 1602 herein, shall first file an application for a permit with the Wetlands Board at the planning department.

STATEMENT OF THE CASE

Richardson Bell, Trustee for the Bell Land Trust, has been trying to build a home on two lots in a mostly developed residential neighborhood. The City of Virginia Beach refused to issue a permit and the Virginia Supreme Court refused to order the payment of just compensation.

A. The Property

In 1979, Seawall Enterprises acquired lots 21 and 22 along the Chesapeake Bay in Virginia Beach. Decision of the Virginia Supreme Court, Appendix A at 2. The lots are approximately 100 yards west of the Chesapeake Bay Bridge and Tunnel. There had been a home on the property, but it was removed about 1975. Transcript of testimony of Dollie Gray, from

appellate appendix in *City of Virginia Beach v. Bell*, before the Virginia Supreme Court (State Appendix) at 88.

Three years later, in 1982, the Seawall Corporation dissolved. Richardson Bell and his wife, who together owned 50% of the stock, acquired the property. Appendix A at 2.

In 1993, the property was put in the Bell Land Trust. Appendix A at 3. At first, Bell and his wife were the beneficiaries of the trust, with a daughter acting as Trustee. Shortly thereafter, however, the Bell children became the beneficiaries and Richardson Bell was named trustee. Testimony of Richardson C. Bell, State Appendix at 42-43.

B. The Regulations

The Virginia General Assembly enacted the Coastal Primary Sand Dune Protection Act in 1980. Appendix A at 1. Virginia Code §§ 28.2-1400 to 1420. This act enabled local communities to adopt their own dune protection ordinances. *Id.* In 1980 the City of Virginia Beach enacted the Coastal Primary Sand Dune Zoning Ordinance pursuant to this enabling legislation. Appendix A at 1-2. *See* Virginia Beach Code §§ 1600-1619. The ordinance requires applicants planning "to 'use or alter any coastal primary sand dune within this city' to obtain a permit from the Virginia Beach Wetlands Board." Appendix A at 2. Virginia Beach Code § 1603(a).

C. Three Attempts to Develop the Property Were Denied

Seawall Enterprises first attempted to develop the property in 1979. The City of Virginia Beach, however, did not approve the plan. Appendix A at 2.

In late 1982, Bell again applied for a permit to develop the property, but it was also denied. *Id.*

The latest attempt to develop the property occurred in 1992, when Bell again submitted a development plan. *Id.* Bell

proposed to connect utilities, provide an access road, build a bulkhead and a single-family dwelling. *Id.* At this time, the property was zoned to permit single-family residential development. Amended Motion for Judgment, as reproduced in state appendix, at 1; testimony of Dennis Gruelle, State appendix at 120. Pursuant to the City's dune protection ordinance, the application was referred to the Virginia Beach Wetlands Board. The board denied Bell's application. Appendix A at 3.

D. The Litigation

Pursuant to the ordinance, Bell appealed the denial to the Virginia Marine Resources Commission (Commission). The Commission also denied Bell's application. Appendix A at 3. Bell next appealed to the Virginia Beach Circuit Court which upheld the denial in late 1993. Appendix A at 3.

In August of 1995 Bell, acting as Trustee, filed an amended motion for judgment against the City alleging that the Wetland Board's denial of Bell's permit application deprived the lots of all economically viable use and therefore constituted a regulatory taking for which the trust was entitled to just compensation. Appendix A at 3.

A jury trial was held in January of 1997. At trial it was established that there was no economically productive or beneficial use remaining in the property. For example, the City's expert appraiser noted that Mr. Bell could only, for example, keep a catamaran on the beach, play volleyball on it, or have a picnic table. Testimony of Thomas Tye, State Appendix at 163-65. The jury found for the Plaintiff and returned a verdict in favor of Bell for $110,000, plus prejudgment interest, for a total award of $141,517. Appendix A at 3; Appendix B at 1-2.

The City appealed. On appeal, Bell contended that the denial of a permit was a "categorical" taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, because the denial eliminated the property's only economically beneficial use. Appendix A at 5.

The Virginia Supreme Court, however, found that this case is distinguishable from *Lucas*. The court subscribed to the notion that when property that is subject to regulation changes hands, the nature of the title changes upon the transfer. According to this "notice rule," the property rights that were affected by the preexisting regulation belong not to the owners of the fee but, apparently, to the City:

> In contrast to *Lucas*, however, the Ordinance at issue here predated Bell's and the Trustee's acquisition of the property. Therefore, the "bundle of rights" which either Bell or the Trustee acquired upon obtaining title to the property did not include the right to develop the lots without restrictions. Thus, because the regulatory restriction was in Bell's and the Trustee's chain of title, the City did not deprive Bell or the Trustee of the right to develop the property freely since that right was never Bell's or the Trustee's to lose.

Appendix A at 6 (footnote omitted). The Court continued that because Bell never acquired the right to develop the property, the City had no need to justify its otherwise categorical taking using the doctrine of nuisance:

> Therefore, the City need not prove the existence of any nuisance or property law preceding the Ordinance that would have prevented the development of the property. Such an inquiry is irrelevant and unnecessary since Bell and the Trustee acquired property already burdened by regulatory restrictions.

Appendix A at 7. Finally, the court focused on the "enactment" rather than the application of the ordinance in determining that Bell never had the right to challenge the ordinance as a taking: "Thus, the City, by enacting the Ordinance, took no property rights from Bell or the Trustee since they cannot suffer a taking of rights never possessed." Appendix A at 7.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Virginia court believes that the background principles of a property's title change every time land is bought and sold. If upheld and allowed to spread, the rule adopted by the Virginia Supreme Court will adversely impact the rights of landowners throughout the United States. As one court recently noted when confronted with a theory similar to that adopted by the Virginia Supreme Court:

> Under such logic, [government] . . . could pass a law that stated that no one could build on their property. After all property had passed hands once, the right to build on one's property would be lost to everyone.

Store Safe Redlands Associates v. United States, 35 Fed. Cl. 726, 735 (1996).

There are at least three distinct legal and logical errors made by the court below. First, this Court has found that the mere passage of a discretionary permitting requirement does not, without more, constitute a taking. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) ("the mere assertion of regulatory jurisdiction . . . does not constitute a regulatory taking"). Furthermore, an allegation that a property regulation constitutes a facial taking is, by its very nature, very difficult to prove. *See Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 495 (1987) (describes facial attack as "uphill battle"). This Court has also made it quite plain that courts should not hear an as applied takings claim unless and until the owner has availed himself of the appropriate permitting procedures. Until that happens the claim is simply not ripe. *See, e.g., Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-94 (1985) (describing need to obtain "final decision" from administrative agency).

But the shield against premature takings actions found in the logic of *Riverside Bayview* and *Williamson County* is turned into a sword by the court below. As will be discussed, the Ninth Circuit and a Florida appellate court have recognized that there is a distinction between facial and as applied takings claims in the context of purchasers of regulated property. While those courts' suggestion that facial claims cannot be brought by subsequent purchasers is questionable, the decisions of those courts that as applied claims for inverse condemnation ***can*** be maintained are consistent with this Court's ripeness doctrine and, therefore, clearly at odds with the Virginia court's holding.

The second error that results from the Virginia court's decision is that, by effectively denying a compensation remedy to Petitioner, government agencies in Virginia will be able to avoid the mandatory remedy for regulatory takings. This Court made it plain in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), that the appropriate remedy for a regulatory taking is the payment of just compensation. 482 U.S. at 322. While a city is free to rescind an offending regulation upon a judicial finding of a taking, it is still responsible for the payment of damages for any temporary taking. *Id.* at 314-22. The state court of Massachusetts holds that a purchaser of regulated property has the right to challenge the legality or constitutionality of the offending regulation but no right to seek just compensation. The Colorado Supreme Court agrees. This, however, leaves owners precisely where they were before *First English*.

Third, while this Court in *Lucas* noted the importance of first defining the "background principles" of property law before embarking on a takings analysis, the court below interprets the "background principles" to be whatever ordinances and regulations were in place at the time the property was last transferred. This ruling turns into an irrelevancy this Court's admonition in *Lucas* to look at the background principles of property law.

The lower state and federal courts are in wide disarray over what effect "notice" of a regulatory scheme has on the ability of a transferee of real property to bring a takings challenge. Some courts fail to make a distinction between as applied and facial takings claims. Some fail to recognize the import of a "categorical" or total take of all productive and beneficial use of property. Some confuse the existence of a regulatory scheme with background principles of state property law. Some suggest that while a compensation remedy may be inappropriate, a purchaser of regulated property might still have the right to challenge the constitutionality of the regulation. And some get it right, holding that a person who acquires real property that is subject to a discretionary permitting scheme has the right to bring a claim for inverse condemnation when the application of the regulation results in a denial of all productive and beneficial use of the property.

This chaotic jumble of reasoning among the lower courts will be described below. This confusion, combined with the plain conflict among these courts and with this Court can only be resolved by granting this petition for writ of certiorari.

I

SOME LOWER STATE AND FEDERAL COURTS HAVE ANALYZED CORRECTLY THE EFFECT OF ACQUIRING REGULATED PROPERTY

A. New Jersey Courts Recognize That a Purchaser of Regulated Property "Steps into the Shoes" of the Prior Owner

In *Urban v. Planning Board of the Borough of Manasquan, Monmouth County, New Jersey*, 592 A.2d 240 (N.J. 1991), the New Jersey Supreme Court was faced with an owner of an existing nonconforming parcel of land, containing several structures, who desired to subdivide the lot into several additional lots, each accommodating one of the structures. 592 A.2d at 241. A key question reviewed by the court was

whether the purchaser of the nonconforming lot had the same rights to maintain the nonconforming use and seek a variance as the original owner had at the time the borough adopted the regulations that made the lot nonconforming in the first place. The court answered affirmatively, holding "the nonconforming rights run with the land irrespective of changes in ownership. . . . That principle is consistent with our view that the status of land use does not turn on the status of ownership." *Id.* at 242-43. *Accord Wilson v. Borough of Mountainside*, 201 A.2d 540, 554 (N.J. 1964) ("if a prior owner would be entitled to such relief, the right is not lost to a purchaser simply because he bought with knowledge of the zoning regulation involved").[1]

The appellate courts of New Jersey have further interpreted the meaning of *Urban* in a context directly analogous to the present case. In *Moroney v. Mayor and Council of the Borough of Old Tappan*, 633 A.2d 1045 (N.J. Super. 1993), *cert. denied*, 642 A.2d 1004 (N.J. 1994), the Moroneys purchased an undersized lot which, under a preexisting zoning ordinance, was too small for a single-family house. 633 A.2d at 1047. After the town denied an application for a hardship variance, the Moroneys sued for inverse condemnation. A trial court concluded that when the Moroneys were denied the variance there had been an inverse condemnation. *Id.* at 1046-47. On appeal, the New Jersey Court of Appeals agreed, holding that

> a right to relief possessed by the original owner passes to the successor in title. Such right is not lost simply because the succeeding owner bought or contracted to buy with knowledge of the lot-size restriction.

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[1] *Accord Zoning Hearing Board v. Grace Building Company*, 395 A.2d 1049, 1052 (Pa. Commw. Ct. 1979) ("the mere fact that property changes hands after the adoption of zoning cannot be a basis for holding that no variance can thereafter be granted . . . . Because zoning variances relate primarily to the circumstances of the property and not to the identity of the owners, it would seem that subsequent purchasers can stand in the shoes of the original owner.").

Id. at 1048. The court concluded that property owners "stand in the shoes of their predecessors in title." *Id.*

Similarly, in *Karam v. State of New Jersey*, 705 A.2d 1221 (N.J. Super. 1998), an appellate court was faced with the question of whether the purchaser of regulated riparian property could maintain a claim for inverse condemnation when the state denied an application to build a dock under a discretionary permitting requirement. *Id.* at 1223-24. While the landowners ultimately lost their taking claim, the court was unequivocal that they had the right to bring the claim, despite the fact that they purchased their property already subject to the permitting requirement:

> We recognize the rights in property pass from one owner to the next. Thus the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge of the impediment to development.

Id. at 1229. The Virginia Supreme Court's holding is, of course, diametrically opposed to the understanding of the New Jersey courts. Rather than finding that the rights in property pass from one owner to the next, the Virginia court found that the "background principles" alluded to in *Lucas* are altered with every transfer of property that follows an intervening regulatory enactment.[2]

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[2] Another lower state court decision of some note on this issue is *K & K Construction Co. v. Michigan Department of Natural Resources*, 551 N.W.2d 413 (Mich. App. 1996), *rev'd on other grounds*, 575 N.W.2d 531 (Mich. 1998), *petition for writ of certiorari pending*, Docket No. 97-1957. In *K & K*, the appellate court responded to the "notice" argument by noting that "the passage of the [regulation] cannot be understood as depriving J.F.K. Company [the landowner] of just compensation merely because the [Wetlands Protection Act] was in effect when the quit claim deed was executed. . . . [T]he

(continued...)

B. The Federal Circuit Has Held That Preexisting Statutes Do Not Bar Maintaining a Takings Claim

In *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996), the Federal Circuit was confronted with the question of whether the fact that the Preseaults purchased their home *after* the federal government enacted a series of statutes affecting a railroad right-of-way that traversed their land somehow insulated the United States from takings liability. According to the terms of the right-of-way, if it was no longer used for railroad purposes the easement would revert to the owners of the underlying land. However, under the federal Rails-to-Trails Act, adopted in 1983, abandoned rights-of-way could be converted for use as public trails. *Id.* at 1531. The Preseaults sued for a regulatory taking.

In response, the United States argued that the Preseaults' property interests in the tract were not defined when the railroad acquired its right-of-way in 1899 but by the evolving enactment and implementation of law between 1899 and the date the Preseaults acquired the land. *Id.* at 1537.

The Federal Circuit Court of Appeals categorically rejected the thesis that general legislation enacted after the creation of the property interests "somehow redefined state-created property rights and destroyed them without entitlement to compensation." *Id.* at 1530. Rather, the rights were defined by the original conveyances and remained unchanged notwithstanding subsequent regulatory enactments. *Id.* at 1537.

Criticizing the government's reliance upon a few inapt quotations from *Lucas*, the court emphasized that the "background principles referred to by the Court in *Lucas* were state-defined *nuisance rules*." *Id.* at 1538 (emphasis added). The court concluded that the Preseaults could bring their takings

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[2] (...continued)
timing of the regulation and the transfer of the land do not dictate that plaintiffs are not entitled to just compensation." 551 N.W.2d at 418.

claim, despite their having acquired the property after the implementation of the regulations. *Id.* at 1537.

The Federal Circuit Court of Appeals observed that the timing of land use regulations and ownership are simply irrelevant to the question of whether a property owner can challenge the regulations as effecting a taking of property without payment of just compensation. *Id.* at 1540. According to the court's understanding of *Lucas*, the relevant inquiry is what were the background principles of property and nuisance law in existence at the time an interest in property was created.

> Under the governing law of the State, the Preseaults, successors in title to those who owned the property when the easements were created, owned the same title and interest as they, and are entitled to the same protections the law grants.

Id.

Under the holding in *Preseault*, Mr. Bell and the Bell Land Trust would have been entitled to challenge the City's taking of all productive and beneficial use and receive just compensation under the Takings Clause. Under the Federal Circuit Court of Appeals' decision, Richardson Bell's ownership interest in the land would have been defined by background principles of property and nuisance law at the time that the fee was created and not by subsequent legislative enactments of the City of Virginia Beach.[3]

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[3] The case of *M & J Coal Company v. United States*, 47 F.3d 1148 (Fed. Cir.), *cert denied*, 116 S. Ct. 53 (1995), is not to the contrary. In that case the Federal Circuit found that a coal company's "acquisition of rights by deed did not give it the right to mine in such a way as to endanger the public health and safety." *Id.* at 1154. "[A]t the time M & J acquired its mining rights, whatever they were, it knew or should have known that it could not mine in such a way as to endanger public health or safety." *Id.* Put another way, the prior

(continued...)

Both the Federal Circuit and the New Jersey courts are consistent with this Court's admonition in *Lucas* not to "redefine" the background principles of property. 505 U.S. at 1014. In this regard, the Virginia Supreme Court stands alone.

II

A RULE THAT INDIVIDUALS WHO ACQUIRE REGULATED PROPERTY CANNOT BRING TAKINGS CLAIMS IS INCONSISTENT WITH THE RATIONALE AND PRACTICAL IMPLICATIONS OF THIS COURT'S RIPENESS DOCTRINE

If property is made subject to a discretionary permitting requirement, when may the landowner bring a challenge based on the takings doctrine? And what kind of challenge can the landowner bring? Theoretically, the owner of the land at the time the regulation is adopted can bring a facial challenge or an as applied challenge. There are great practical difficulties in bringing a facial challenge because an owner must prove that there has been a taking under all possible applications of the rule. As this Court aptly stated in *Keystone Bituminous Coal Association*, 480 U.S. at 495, this is an "uphill battle." Furthermore, as this Court also aptly pointed out in *Riverside Bayview*, "the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." 474 U.S. at 127. There is also the additional complicating factor that if a facial challenge is not brought

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[3] (...continued)
owner certainly had no right to mine in a manner that would constitute a nuisance, and the new owner acquired no greater rights than the prior owner. This was not a case of make-weight nuisance arguments. The mine had caused a gas meter to "spin[] wildly," stretched electrical transmission wires "tight as a fiddle string," and a "neighbor's dog had fallen into a [subsidence] crack to its death." *Id.* at 1151.

within the statute of limitations, it may be lost forever. Thus, the potential that a landowner may be able to prevail with a facial takings challenge at the time a regulatory scheme is imposed is remote.

An as applied takings challenge too can be a difficult task, especially for landowners with limited time and means. This Court has made it quite plain that a landowner has no business bringing an as applied takings claim until the claim is fully ripe. At minimum, this means obtaining a "final decision regarding the application of the regulation to the property at issue." *Williamson County*, 473 U.S. at 186. This may include the seeking of a variance. *Id.* at 188. This may include more than submitting a subdivision application if the regulations might allow other uses of property. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986). As one commentator has noted, "[t]he 'as applied' challenge is complex and expensive under any circumstance . . . under the . . . ripeness doctrine, . . . the owner must demonstrate that it has come up with several different sets of proposals and has seen each of these through various types of review and appeals." Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law,"* 42 N.Y.L. Sch. L. Rev. 345, 376 (1998).[4] In short, it is not an easy task for a property owner to bring an as applied takings claim.

In order to allow a reasonably practicable route to raise a regulatory taking claim, it is imperative that an owner's successor in interest can bring either a facial or an as applied claim for a regulatory taking. If a subsequent owner could not

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[4] *See also* Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1 (1992); Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases, or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, Proc. Inst. on Plan., Zoning & Eminent Domain, Ch. 7, § 7.02[2] at 7-7 through 7-19 (1991).

bring an as applied takings challenge, then the ripeness doctrine would lead to the harsh result of precluding any practical remedy for regulatory takings. This result is avoided by allowing subsequent owners the right to bring an as applied takings challenge.

The Virginia Supreme Court said that the subsequent landowner could not bring an as applied claim. As noted above, the New Jersey Court and Federal Circuit have held, without distinguishing between facial and as applied challenges, that a new owner may apply for a variance or bring an action for inverse condemnation.

Other courts, however, draw a distinction between facial and as applied takings challenges. As will be discussed next, the Ninth Circuit and the Florida appellate courts believe that the subsequent owner can bring an as applied challenge but not a facial challenge. As such, these courts are in conflict with the Virginia court's prohibition against an as applied challenge brought by a subsequent owner. These courts' findings that facial challenges cannot be brought points to the high degree of doctrinal confusion in the lower courts, although the present case may be decided without reaching this particular aspect of the "notice" rule.

A. The Ninth Circuit Recognizes a Distinction Between "As Applied" and "Facial" Challenges to Regulations That Are Based on a Takings Theory; the Court Holds That an Acquirer of Regulated Property May Bring an As Applied Takings Challenge

In *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468 (9th Cir. 1994), the Ninth Circuit addressed a challenge to mobile home rent control ordinances adopted by the City of Carson, California. A mobile home park, Carson Harbor Village, filed four claims based on a takings theory against the city. Two of the claims were "as applied" challenges, alleging that the denial of specific applications effected regulatory takings. The other two claims were facial claims, arguing that

the adoption of the rent control law and a related "conversion" law (restricting the conversion of mobile home parks to other uses) effected a taking.

The rent control law was enacted in 1979 and the conversion law in 1982. *Id.* at 476. Carson Harbor Village purchased the mobile home park in 1983. Although the "as applied" takings claims foundered on other procedural grounds,[5] the court had no trouble in addressing these claims despite the fact that the property was purchased ***after*** the enactment of the ordinances.

The facial claims, however, were another matter. Reasoning that the facial claims to the rent control and conversion ordinances stated a causes of action that matured upon the adoption of the ordinances, the court found that Carson Harbor had no standing to bring the facial claims:

> Because Carson Harbor did not own the property when the statutes were enacted and when the alleged facial takings occurred, it has incurred no injury entitling it to assert a facial claim.
>
> . . . .
>
> A landowner who purchased land ***after an alleged taking*** cannot avail himself of the Just Compensation Clause because he has suffered no injury.

37 F.3d at 476 (emphasis added). The question of whether a purchaser of regulated property may bring a ***facial*** takings claim

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[5] The first as applied claim was against the rent control law stemming from a denial of a rent increase. It failed because the owner did not bring the takings claim in state court, as required by the second ripeness test of *Williamson County*, 473 U.S. at 194 (a claimant must "seek compensation through the procedures the State has provided"). The second as applied claim was to the conversion ordinance. That claim failed because the plaintiff did not obtain a final administrative decision also required by *Williamson County*. *See* 37 F.3d at 475.

based on the regulation is an interesting one, and may depend in large part on whether a facial takings claim is a personal right or one that runs with the land. But this question is ***not*** not part of the present case brought by the Bell Land Trust.

The Ninth Circuit in *Carson Harbor Village* unhesitatingly addressed the ***as applied*** takings challenges to the rent control and conversion ordinances. Bell's takings claims are not facial and, therefore, did not accrue upon ***enactment*** of the dune protection ordinance. Instead, Bell's claims matured only when the City denied Bell's permit application. But the Virginia court utterly missed this distinction when it held: "Thus, the City by ***enacting*** the Ordinance, took no property rights from Bell or the Trustee." Appendix A at 7 (emphasis added). This reference to a taking upon "enactment" indicates that the Virginia court fails to see the distinction between facial and as applied takings claims. Bell, of course, argues that denial of the permit rather than the enactment of the ordinance took the property. In any event, if Bell had been able to file his claims in the Ninth Circuit, the court would certainly have entertained those claims.

B. A Florida Court of Appeals Recognizes the Distinction Between a Challenge to a Preexisting Zoning Regulation and a Permit Denial

Relying on logic that is quite similar to the reasoning employed by the Ninth Circuit in *Carson Harbor Village*, the Florida District Court of Appeal determined that a preexisting permitting requirement is not a bar to a claim for inverse condemnation brought by a purchaser of regulated property. In *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223, *rev. denied*, 613 So. 2d 3 (Fla. 1992), the Florida District Court of Appeal held that the denial of a permit constituted a regulatory taking of property even though the denial was based on a regulation that existed before the owner acquired her land. *Id.* at 1229.

The Warren S. Henderson Wetlands Protection Act was adopted in 1984. *Id.* at 1225. Two years later, Mrs. Vatalaro purchased two residentially zoned lots in order to build two homes on one-half acre of her property, one for herself and one for her daughter. *Id.* at 1226. The Florida Department of Environmental Resources determined that Mrs. Vatalaro's property was located within a 20-acre wetland and required her to apply for a dredge and fill permit. The permit was denied. *Id.* at 1225-27.

Mrs. Vatalaro sued, alleging that the permit denial deprived her of all economically viable use of her property. The state responded that, because Mrs. Vatalaro purchased her property after the enactment of the Wetlands Protection Act, she had constructive notice that her building permit might be denied and therefore did not suffer a compensable taking. *Id.* at 1229.

The Florida court strongly disagreed, holding that Mrs. Vatalaro had the right to build on her property and that the Wetlands Protection Act, enacted before she purchased her land, did not insulate the state from takings liability. *Id.* Employing logic analogous to the Ninth Circuit's distinction between facial and as applied challenges, the Florida court held "that no taking occurred until DER denied Vatalaro's permit application and determined the property was suitable only for limited passive recreational use." *Id.*[6] If the Virginia Supreme Court had recognized the distinction employed by the Florida Court between permitting requirements and preexisting zoning laws, then Richardson Bell would have been able to pursue his inverse condemnation cause of action based on the denial of the permit application. That it did not points to the substantial conflict among the lower courts.

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[6] *But see Namon v. State of Florida*, 558 So. 2d 504, 505 (Fla. Dist. Ct. 1990) (purchaser with "constructive knowledge of the applicable land use regulations" has no compensable taking).

III

COLORADO AND MASSACHUSETTS HAVE ADOPTED A REGULATORY TAKINGS THEORY THAT IS INCONSISTENT WITH THAT OF THE VIRGINIA COURT, BUT REACHES A SIMILAR PRACTICAL RESULT FOR THE PROPERTY OWNER BY DENYING THE JUST COMPENSATION REMEDY FOR OWNERS WHO ACQUIRED TITLE AFTER THE OFFENDING REGULATION WAS ADOPTED

The courts of Massachusetts and Colorado have developed yet another twist on the theme that a person acquiring already regulated property has only a limited ability to seek relief from the regulations under the takings doctrine. These courts adopt a theory that contradicts the "facial" versus "as applied" distinction drawn in the Ninth Circuit and Florida (and ignored in Virginia). These courts suggest that invalidation (without specifying whether it be through a facial or as applied attack) is the appropriate remedy, but that a claim for damages is not (again without specifying whether it is a facial or as applied challenge). This suggestion, however, eviscerates this Court's holdings that just compensation is a self-executing and appropriate remedy whenever government regulation takes property.

The idea that a person acquiring property after the enactment of a regulation can challenge the validity of a regulation is in conflict with the Virginia court's holding that a subsequent owner "can suffer no taking of rights never possessed." Appendix A at 7. But the notion also advanced by Massachusetts and to some degree Colorado that the new owner may not seek just compensation for a taking, reaches a similar practical result as the Virginia court, although under a completely different theoretical basis.

Prior to this Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,

482 U.S. 304, the rule in California was that a landowner could never obtain damages for a regulatory taking. *Id.* at 317. A landowner's only remedy to the application of a regulation that took private property without the payment of just compensation was to ask a court to invalidate the offending regulation. *Id.* This court reversed, holding that where government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. *Id.* at 321.

The rule against paying just compensation has been revived, however, in Colorado and Massachusetts when a takings challenge is brought by an owner of property who purchased with notice of the regulatory requirement.

A. The Massachusetts Supreme Court Has Upheld the Right to Challenge a Regulation That Violates the Takings Clause, but Not the Right to Just Compensation for a Taking

In *Lopes v. City of Peabody*, 595 N.E.2d 812, *rev. denied*, 600 N.E.2d 171 (1992), *cert. granted and judgment vacated*, 113 S. Ct. 1574 (1993), *on remand*, 629 N.E.2d 1312, 1314-15 (1994), the Massachusetts courts held that a property owner is entitled to challenge a preexisting land use restriction that results in a taking of private property.

Six years after the enactment of the ordinance, Americo Lopes acquired a lot zoned for a single-family residence that was located in a conservancy district. 629 N.E.2d at 1313. Under the wetlands restrictions, Lopes could not build a residence on or make any other use of his lot. *Id.* at 1313-14.

Lopes appealed and lost in trial court. On appeal, the Massachusetts Appeals Court concluded that "Lopes, who knew of the regulations when he bought the parcel, 'can hardly claim inverse condemnation.'" *Id.* at 1314.

After this Court granted Lopes' petition for writ of certiorari and remanded the case, the Massachusetts Supreme Judicial Court ruled that Lopes, whose property was "subject to the restriction at the time of his purchase, has every right to challenge the continued application of the restriction." *Id.* at 1314-15. The Massachusetts court observed:

> A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effect of changed circumstances, and tend to press owners to bring actions challenging any zoning provision of doubtful validity before selling their property. Moreover, such a rule of law would in time lead to a crazy-quilt pattern of the enforceability of a zoning law intended to have uniform applicability.

Id. at 1315.

However, Massachusetts has difficulty (despite *First English*) recognizing that inverse condemnation ***damages*** are an appropriate remedy for a regulation that takes property. In *Leonard v. Town of Brimfield*, 666 N.E.2d 1300 (Mass.), *cert. denied*, 117 S. Ct. 582 (1996), a landowner sought a special permit in order to build on her land located in a flood plain. *Id.* at 1302. After the permit was denied she appealed arguing that the denial was arbitrary and capricious. *Id.* She lost. *Id.* Next she brought an action alleging that the town was liable for, among other things, a compensable taking, stemming from the decrease in the value of her land. *Id.* After losing in trial court she appealed.

On appeal the Massachusetts Supreme Judicial Court noted that Leonard had the right, as affirmed in *Lopes*, to challenge the validity of the flood plain ordinance, but that the ordinance had been upheld. *Id.* at 1303 n.3. Next, in considering whether the valid regulation took her property, the court considered her

"investment-backed expectations." It held that she had none: "Because she purchased the property subject to the restrictions on building in a flood plain, she may not complain about the loss of a right she never acquired." *Id.* In *Leonard*, therefore, while the court did allow a takings claim that sought invalidation of the regulation, it did not allow a claim for inverse condemnation based on the impact of the regulation on the property. Whether this is best viewed as a restriction on the damages allowed or the denial of an underlying cause of action (inverse condemnation), the result is the same as for the present case: no compensation is available when an otherwise ***valid*** regulation allegedly denies economically viable use of a parcel. However, if this result is reached, it is conflict with this Court's holding in *First English* that just compensation is the appropriate remedy when there has been a taking.

B. Adopting the Theme of "Self-Inflicted Hardship" the Colorado Supreme Court Will Allow a Challenge to a Regulation's Constitutionality

Only a year after this Court's decision in *First English*, the Colorado Supreme Court decided *Cottonwood Farms v. Board of Commissioners of the County of Jefferson*, 763 P.2d 551 (Colo. 1988). In this case Cottonwood Farms had acquired property classified as agriculture on existing zoning regulations. *Id.* at 552. The county planning department denied a request for rezoning that would have allowed aggregate mining. *Id.* In response to Cottonwood's suit challenging the denial under the Takings Doctrine, the district court and the Colorado Court of Appeals found that because Cottonwood purchased the property subject to an existing zoning scheme, it had suffered only a

"self-inflicted hardship." *Id.* at 553.[7] On appeal the Colorado Supreme Court did not completely agree. It noted first:

> The majority of courts have held that the fact of prior purchase with knowledge of applicable zoning regulations does not preclude a property owner from challenging the validity of the regulations on constitutional grounds, but does constitute a factor.

Id. at 555. The court continued by noting that this factor is of diminished importance

> when an owner asserts that a zoning regulation is constitutionally invalid ***either facially or as applied*** under . . . takings tests . . . [because] the owner's particular economic interest is no longer the focus of the proceeding. Rather, the efficacy of the governmental act itself seems to become the primary issue.

Id. at 556 (emphasis added). The court concluded that Cottonwood may "challeng[e] the validity of the regulation on the ground that it effects a taking without just compensation." *Id.* at 558.[8]

This holding is not doctrinally consistent with those courts mentioned above (the Ninth Circuit and Florida) that distinguished between facial and as applied challenges to preexisting

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[7] In *Spence v. Board of Zoning Appeals for the City of Virginia Beach*, 496 S.E.2d 61 (1998), the purchaser of land, who was on notice of a regulation at the time of the purchase, sought and obtained a variance. In response to a neighbor-objector, the Virginia Supreme Court held that the self-inflicted hardship doctrine did not apply. There were no allegations of a taking in *Spence*.

[8] The ability of a subsequent owner to challenge a regulation on a takings theory without focusing on a "particular economic interest" is especially apt for those regulations that fail to substantially advance legitimate state interests. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

land use regulations. There also may be a conflict with the Virginia Supreme Court's determination in the present case that Richardson Bell cannot maintain a takings claim against the City.[9]

The decisions of the courts of Massachusetts and Colorado allow the purchaser of regulated property to challenge the validity of a regulation on a theory of a regulatory taking. However, to the extent that the court in Massachusetts (and perhaps the Colorado court as well) believe that an inverse condemnation cause of action that seeks just compensation is unavailable, these cases, like the Virginia decision at issue, are inconsistent with this Court's holding in *First English*.

IV

OTHER COURTS HAVE ADOPTED THE RULE OF NO COMPENSATION FOR A TAKING OF REGULATED PROPERTY

Virginia is not alone. There are several state courts that have adopted a so-called "notice" rule under which a purchaser of regulated property is considered to have "constructive notice" of the regulatory scheme at the time of the acquisition and thus acquires no claim to challenge the application of preexisting regulations. For example, in *Claridge v. New Hampshire Wetlands Board*, 485 A.2d 287 (N.H. 1984), the owners of a residential lot were denied permission to construct a single-

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[9] The Colorado Supreme Court also suggested in dicta that claims for invalidation are treated differently from those seeking damages under an inverse condemnation theory: "Courts have invariably denied damages claims by subsequent purchasers with knowledge based on alleged inverse condemnation, but there has been no agreement to the precise basis of this result." *Cottonwood Farms*, 763 P.2d. at 557 n.5. The suggestion that just compensation is not an appropriate remedy for a takings claim by owners who had knowledge of the regulation when the acquired title reaches the same result that the Virginia court reached when it denied Bell the ability to bring any takings claim for the denial of the permit application.

family home and septic system. *Id.* at 289. Because it was part of a valuable wetland, the permit was denied. *Id.* The owners alleged a taking. At trial there was some evidence that, because the lot had some "limited recreational use" or could be sold to neighboring homeowners, the lot had "some economic value." *Id.*[10] More significantly, however, the New Hampshire Supreme Court wrote that "[a]t the time of that purchase, the Claridges had constructive notice that the property was subject to State wetlands statutes." *Id.* at 292. Furthermore, the Claridges "chose to take [the risk] in buying this lot with notice of regulatory impediments and in waiting to develop the property in the context of growing public concerns about wetlands." *Id.* As a result the Claridges had only a "limited constitutionally protectable 'property interest' in the right to develop this lot" meaning that they had not suffered an "unreasonably onerous" burden and therefore could not proceed with a takings claim. *Id.*

In the most dramatic adoption of this "notice" rule, in 1997, the New York Court of Appeals issued four opinions finding that property owners are not entitled to seek takings damages for the application of regulations that were adopted prior to the purchase of the property. In essence, the court found compensation is not available to purchasers of regulated property when the application of a preexisting regulation takes all beneficial and productive use or if the government physically invades property. *See In the Matter of Rose E. Anello v. Zoning Board of Appeals of Village of Dobbs Ferry*, 678 N.E.2d 870 (1997) (not taking when steep slope ordinance denied all economic use because land purchased subject to ordinance); *Basile v. Town of Southampton*, 666 N.E.2d 1060 (damages in condemnation action should not reflect development potential because land purchased subject to wetlands restrictions), *cert. denied*,

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[10] Other than such speculative "value," it does not appear that any economically beneficial or productive use of the property actually remained. *Id.* at 292-93 (King., C.J., concurring). Under *Lucas* this would be a categorical taking.

118 S. Ct. 264 (1997); *Gazza v. New York Department of Environmental Conservation*, 679 N.E.2d 1035, 1038 n.3 (no taking when wetland permit denied because land purchased with knowledge of permitting requirement), *cert. denied*, 118 S. Ct. 58 (1997); and *Kim v. City of New York*, 647 N.E.2d 123 (no taking when the City of New York physically invaded private property by dumping fill on 2,400-square feet of land in order to support a newly raised highway), *cert. denied*, 118 S. Ct. 50 (1997). *Id.* The essence of the New York court's holding is that whenever regulated property is transferred the government acquires a new servitude defined by the maximum scope of all regulations in existence at the instant of transfer.

Other state court decisions employing similar reasoning include *Hunziker v. Iowa*, 519 N.W.2d 367 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995) (finding no taking when purchaser of property discovers protected Indian burial mound); *Grant v. South Carolina Coastal Council*, 461 S.E.2d 388 (S.C. 1995) (no right to fill critical area because owner purchased land when statute was in existence); and possibly *Kavanau v. Santa Monica Rent Control Board*, 16 Cal. 4th 761 (1997), *cert. denied*, 118 S. Ct. 856 (1998) ("Similarly, the 'interfere[nce] with [Kavanau's] distinct investment-backed expectations' . . . was minor, considering he had constructive knowledge [of the rent control regulations subject to the takings challenge.]").

Finally, a few federal trial courts have adopted the notice rule. For example, in *Creppel v. United States*, 33 Fed. Cl. 600 (1995), the Court of Federal Claims found that purchasers of property that had already been allegedly taken had no cognizable takings claim. And in *Good v. United States*, 39 Fed. Cl. 81 (1997), *appeal pending*, a taking claim was denied in part because the owner purchased property after it had already been subjected to extensive state wetlands regulations. *See also Ciampitti v. United* States, 22 Cl. Ct. 310, 321 (1991) (no taking because of ample warning prior to purchase that the property was encumbered). *But see Store Safe Redlands Associates v.*

United States, 35 Fed. Cl. at 734 (defendant's argument that plaintiff "cannot 'predicate a taking on regulatory actions predating its purchase of the property,' is not a logical conclusion"); and *Bowles v. United States*, 31 Fed. Cl. 37, 50-51 n.15 (1994) (noting that this Court's decision in *Nollan* "limits the applicability of the 'notice' defense . . . [and] one could argue that prior 'notice' has no relevance in cases involving land use regulation").

While it is possible to distinguish many, if not most, of these state cases to their facts, especially those not involving, as here, a total categorical take, the troubling fact remains that there is little uniformity among the lower courts on the issue of whether just compensation is available to purchasers of regulated property when the application of a preexisting regulation takes all beneficial and productive use. This deeply entrenched conflict can be resolved only by this Court.

V

THE VIRGINIA SUPREME COURT CONTRADICTS THIS COURT'S HOLDING IN LUCAS

In a recently published article, Professor Steven J. Eagle is highly critical of the notion that just compensation is not available when the application of a regulation takes private property just because the owner purchased the land subject to an existing regulatory scheme. *See* Eagle, 42 N.Y.L. Sch. L. Rev. 345. One of Professor Eagle's principal criticisms is that these cases artfully rewrite this Court's holding in *Lucas*.

Eagle's criticisms are equally applicable to the Virginia Supreme Court's decision in this case. First, by suggesting that the right to bring an inverse condemnation claim against the application of a regulation cannot be transferred with the property, the court "converts an important component of the fee simple--the right to use one's land--into a personal right that has to be exercised during life or else vanishes." *Id.* at 368. The impact of such a rule is especially apparent when the prior owner

was a decedent who "'through infirmity or other reason, could not challenge a confiscatory regulation prior to the decedent's death.'" *Id.* (quoting *Anello*, 678 N.E.2d at 873 (Wesley, J., dissenting)). This conversion of the fee simple into something else contradicts this Court's admonition in *Lucas* that "the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." 505 U.S. at 1014.

Eagle also suggests that the New York court's rule "rewrites" this Court's holding in *Lucas* when this Court focused on the "background principles" and "traditional understandings" of property. The New York Court of Appeals focused exclusively on "state powers over principles." 42 N.Y.L. Sch. L. Rev. at 384-85. The result is that the New York Court uses *Lucas* to justify its conclusion that rights in regulated property change when title passes from one individual to another. *Id.*

The Virginia Court ignored the necessary first step of looking to see whether the land was encumbered by, for example, the state's common law of nuisance or some other "background principle." The court below looked only to the state of the regulatory environment at the time the land was most recently transferred. In this case, the Bell property is surrounded by residential development and it contained a home as recently as 1975. Therefore, the city would have been hard pressed to prove that the building of another home was a nuisance as defined by the background principles of state property law. But the Virginia Supreme Court held that the mere existence of a discretionary regulatory scheme at the time of transfer from a corporation to the corporation's 50% shareholder is enough to block the ability to maintain an as applied claim for inverse condemnation. This sort of logic is directly contrary to this Court's holding in *Lucas* that background limitations that destroy the use of property "cannot be newly legislated or decreed . . . but must inhere in the title

itself." *Lucas*, 505 U.S. at 1029.[11] Likewise, in *Phillips v. Washington Legal Foundation*, No. 96-1578, slip op. at Part II (June 15, 1998), this Court held that a state may not disavow long-recognized property interests with respect to "confiscatory regulations." Confiscatory regulations, such as those that deny all economically beneficial or productive use, as opposed to those that merely regulate some use of property, are at issue in the present case.

What the New York Court accomplished is precisely what the Virginia Supreme Court accomplished when it said "the 'bundle of rights' which either Bell or the Trustee acquired upon obtaining title to the property did not include the right to develop the lots without restrictions." App. A at 6.

CONCLUSION

In *Nollan v. California Coastal Commission*, 483 U.S. 825, this Court wrote:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Id. at 833 n.2. Some courts have understood this principle well, and have allowed purchasers and other persons acquiring regulated property to bring takings claims arising out of the

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[11] One commentator, it must be pointed out, believes this undermining of *Lucas* to be a commendable result: "The Court of Appeals decisions almost totally undermine the Lucas case." Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, B.C. Envtl. Aff. L. Rev. 347, 421 (1998) (the author proposes that the "bundle of sticks" in property must be redefined to include "green wood" of ecological character).

regulatory restrictions. But, through the employment of a bewildering variety of legal rationales, other lower courts have not. Few courts have even approached consistency with one another in determining in which contexts regulatory takings claims may be brought by purchasers of regulated property and under what legal theories these results should be justified. Thus in some courts owners of already regulated property can bring as applied challenges but not facial ones, in other courts owners can seek invalidation but not damages, and in still other jurisdictions owners can apparently do nothing at all because the state is deemed to own whatever interests are regulated as soon as property is transferred from one owner to another.

This Court should grant this petition for writ of certiorari so that it can begin to put order back into the takings doctrine. The facts of this case present an opportunity to provide some much needed guidance in a reasonably narrow context: Whether a person who acquires property subject to a preexisting permitting requirement may maintain an action for a regulatory taking when the regulation is applied to the property in a manner that denies all economically beneficial and productive use.

For these reasons, it is respectfully requested that this Court grant this petition for writ of certiorari.

DATED: June, 1998.

Respectfully submitted,

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APPENDIX

Appendix A-1

Filed 2/27/98

City of VIRGINIA BEACH

v.

Richardson C. BELL, Trustee for Bell Land Trust

No. 971117.

Supreme Court of Virginia.

Feb. 27, 1998.

HANSON, Jr.

In this appeal, we consider first whether the City of Virginia Beach (the City) is a proper defendant in this action for inverse condemnation. We next determine whether the denial of a permit required by the City's Coastal Primary Sand Dune Zoning Ordinance (the Ordinance) constitutes a regulatory taking and thereby requires the City to compensate the property owner for the value of the property taken. Because the denial of the permit was pursuant to the City's Ordinance, the City is a proper defendant. However, because the City's Ordinance predates the owner's acquisition of the property, the denial of the permit does not constitute a compensable taking. Accordingly, we will reverse the judgment of the circuit court.

I.

The General Assembly enacted the Coastal Primary Sand Dune Protection Act (the Dune Act) in 1980. See Code §§ 62.1-13.21 to -13.28.[1] The policy behind the Dune Act is to "preserve and protect coastal primary sand dunes and beaches and to

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[1] The Dune Act was originally codified in Code §§ 62.1-13.21 to -13.28. For purposes of this opinion, references to the Dune Act are to the sections in effect when this action was commenced. The Dune Act is now recodified as Coastal Primary Sand Dunes and Beaches in Code §§ 28.2-1400 to 1420.

prevent their despoliation and destruction and whenever practical to accommodate necessary economic development in a manner consistent with the protection of such features." Code § 62.1-13.21. The Dune Act contains a model ordinance which certain local governments, including the City, could adopt. *See* Code § 62.1-13.25.

In 1980, the City passed the Ordinance, which mirrors the Dune Act's model ordinance. *See* Va. Beach Code §§ 1600-1619. The Ordinance regulates the use and development of coastal primary sand dunes and requires developers who wish to "use or alter any coastal primary sand dune within this city" to obtain a permit from the Virginia Beach Wetlands Board (the Wetlands Board). Va. Beach Code § 1603. If the Wetlands Board denies the permit application, the applicant may either resubmit the application in modified form or seek review by the Virginia Marine Resources Commission (VMRC). *See* Va. Beach Code § 1608(c); Code § 62.1-13.27.

The instant appeal involves two parcels of land, lots 21 and 22, located seaward of the primary coastal dune on the Chesapeake Bay shore. In 1979, Seawall Enterprises, Inc. (Seawall), a corporation in which Richardson C. Bell (Bell) and his wife owned 50% of the stock, bought the two parcels. When Seawall purchased lots 21 and 22, neither the Dune Act nor the Ordinance was in existence. Seawall intended to develop residential houses on the lots and attempted to do so in 1979; however, the City did not approve the plan.

When Seawall dissolved, Bell and his wife received title to lots 21 and 22 by a deed dated August 5, 1982. In late 1982, Bell submitted to the City an application to develop lots 21 and 22, but the City did not approve the 1982 plan either. In 1992, Bell again submitted a development plan for the two lots.[2] The City informed Bell that he first had to submit the plan to the

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[2] Bell's development proposal was to construct a roadway, water and sewer extensions, and a bulkhead for a single family dwelling.

Wetlands Board and obtain a dune permit as required by the Ordinance. However, upon his pursuit of such a permit, the Wetlands Board denied Bell's application.

After the Wetlands Board's denial, Bell appealed to the VMRC, which also denied Bell's application. Bell then appealed to the court below, and on November 3, 1993, the court affirmed VMRC's decision. By that time, the Bells had divorced, and in a deed dated March 17, 1993, Bell and his wife transferred lots 21 and 22 to the Bell Land Trust. Bell is currently the trustee of that trust.[3]

In August 1995, the Trustee filed an amended motion for judgment against the City. In the motion, the Trustee alleged that the Wetlands Board's denial of Bell's application for a permit deprived lots 21 and 22 of all economically beneficial use and therefore constituted a regulatory taking in violation of Article I, § 11 of the Constitution of Virginia. The Trustee thus sought compensation from the City for the value of the property taken.

A jury trial was held in January 1997. The City moved to strike the evidence at the conclusion of the Trustee's evidence as well as at the conclusion of all the evidence. The trial court denied both motions, and the jury returned a verdict in favor of the Trustee, awarding damages of $110,000 plus interest. The City filed a motion to set aside the verdict, which the court denied. The trial court then entered judgment in favor of the Trustee. The City appeals.

II.

A.

The first issue is whether the City is a proper defendant. "It is axiomatic that a plaintiff has the duty to name the proper

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[3] For purposes of clarification, when we use the name "Bell," we refer to his acting in an individual capacity When we address his actions as trustee of the Bell Land Trust, we will use the term "Trustee."

parties as defendants . . . ." *Lake v. Northern Virginia Women's Medical Center, Inc.*, 253 Va. 255, 260, 483 S.E.2d 220, 222 (1997). The City contends that it is not a proper defendant because when it adopted the Ordinance, it was implementing state policy. The City also posits that the Wetlands Board, in denying Bell's application, was acting pursuant to the Dune Act and was therefore also implementing state policy. Consequently, under this theory, the denial of the permit constituted state action. In sum, the City argues that since the City had minimal involvement with the regulation of lots 21 and 22, the City is not a proper defendant.

We reject these contentions. First, the City enacted the Ordinance with the stated intent to "regulat[e] the use and development of coastal primary sand dunes." Va. Beach Code § 1600. Thus, the restriction imposed on the property was the result of city, not state, policy. Second, in refusing to issue the permit, the Wetlands Board was acting pursuant to the City's Ordinance, which bestows upon the Wetlands Board the power to grant or deny permit applications.[4] Nor is it relevant that the final administrative decision was from the VMRC, a state agency. In denying the application, the VMRC was using its statutory power to review the decision of the Wetlands Board. Code § 62.1-13.11. In conducting its review, the VMRC was determining the legality of city, not state, was acting in accord with the Dune Act. Therefore, the VMRC was determining the legality of city, not state, action. Thus we conclude that the City is a proper defendant.

B.

We next consider whether the Wetlands Board's denial of Bell's application resulted in a compensable taking. Article I,

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[4] Indeed, the Wetlands Board's Notice of Public Hearing states that in considering the application, the Wetlands Board was acting "[p]ursuant to the City of Virginia Beach Zoning Ordinance, Articles 14 and 16."

§ 11 of the Constitution of Virginia prohibits the government from taking or damaging private property for public uses without just compensation.[5] The United States Supreme Court has stated that a compensable taking exists for purposes of the Fifth Amendment, without the need for a "case-specific inquiry," when state regulations compel property owners "to suffer a physical 'invasion' of [their] property" or when regulatory action "denies all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).[6] The Trustee contends that the denial of the permit was a categorical taking under Lucas because the Ordinance's effect is to eliminate the property's only economically beneficial use.[7]

However, in Lucas the Court also recognized that not all categorical takings are compensable. The Court declared that a state may "resist compensation," even in categorical takings, if an "inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. Thus, a property owner may seek compensation for a categorical taking only when the state is

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[5] Article I, § 11 provides in pertinent part: [T]he General Assembly shall not pass any law whereby private property shall be taken or damaged for public uses, without just compensation . . . .

[6] *Lucas* addressed the issue of regulatory taking in the context of the Fifth Amendment to the United States Constitution. However, in interpreting art. I, § 11 of the Constitution of Virginia, we have cited to and sought guidance from cases involving takings under the Fifth Amendment. *See, e.g., City of Virginia Beach v. Virginia Land Investment*, 239 Va. 412, 417, 389 S.E.2d 312, 314 (1990); *Commonwealth ex rel State Water Control Board v. County Utilities Corp.*, 223 Va. 534, 542, 290 S.E.2d 867, 872 (1982).

[7] We assume, without deciding, that the Trustee may assert the denial of a permit application submitted by Bell, not the Trustee, as the basis for the Trustee's claim for inverse condemnation.

exercising regulatory power over the "bundle of rights" that the owner acquired when first obtaining title to the property. *Id.*

We, therefore, disagree with the Trustee's contention that the denial of the application is akin to the compensable taking found in *Lucas*. The instant case differs from *Lucas* in a significant aspect: the timing of the owner's purchase of the property in relation to the effective date of the regulatory restriction. In *Lucas*, the plaintiff property owners purchased the land prior to the enactment of the regulation restricting the use of their property. Thus, the subsequent regulation directly affected the property owners' "bundle of rights" which, at the time of their purchase, included the right to develop their property freely.

In contrast to *Lucas*, however, the Ordinance at issue here predated Bell's and the Trustee's acquisition of the property. Therefore, the "bundle of rights" which either Bell or the Trustee acquired upon obtaining title to the property did not include the right to develop the lots without restrictions.[8] Thus, because the regulatory restriction was in Bell's and the Trustee's chain of title, the City did not deprive Bell or the Trustee of the right to develop the property freely since that right was never Bell's or the Trustee's to lose. At best, any rights impaired by the Ordinance were those of the property owner at the time the Ordinance came into effect.

The Trustee argues, however, that the principle in *Lucas* is not that a property owner, in order to enjoy unrestricted development of the property, must buy the property before the enactment of the regulatory restriction. Rather, the Trustee posits

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[8] Contrary to the Trustee's assertions, the fact that a residential home had once occupied lot 21 or that the surrounding lots similar to lots 21 and 22 contained residential houses does not necessitate a finding that the "bundle of rights" included the right to develop a residential home. The only fact relevant to a proper determination of Bell's or the Trustee's property rights is the date of acquisition of the lots.

that under *Lucas*, a state must show that the regulatory restriction "does not proscribe a productive use that was previously permissible under relevant property and nuisance principles," and only then can the state claim that it is not taking any rights from the property owner. *Lucas*, 505 U.S. at 1029-30. In other words, according to the Trustee, the prohibited purpose under a regulatory restriction must have "always [been] unlawful;" otherwise, a restriction on development constitutes a taking. *Lucas*, 505 U.S. at 1030.

However, the Trustee's argument again ignores the critical fact distinguishing *Lucas* from the instant case. In *Lucas*, the owners' acquisition pre-dated the regulatory restriction. Therefore, the only way the State of South Carolina could have argued that the restriction was not a taking would have been to show that, at the time of the owners' purchase, fundamental nuisance and property law had always prevented them from developing their property and that the statutory restriction was simply making explicit relevant property and nuisance law. In contrast to *Lucas*, not only Bell but also the Trustee acquired lots 21 and 22 after the enactment of the Ordinance restricting the property's development. Therefore, the City need not prove the existence of any nuisance or property law preceding the Ordinance that would have prevented the development of the property. Such an inquiry is irrelevant and unnecessary since Bell and the Trustee acquired property already burdened by regulatory restrictions. Thus, the City, by enacting the Ordinance, took no property rights from Bell or the Trustee since they cannot suffer a taking of rights never possessed.

Nevertheless, the Trustee seeks to avoid the Ordinance's restrictions by contending that the Ordinance did not pre-date Bell's ownership rights to lots 21 and 22. The Trustee posits that Seawall's acquistion of lots 21 and 22 in 1979 established Bell's ownership rights in the property because he was a share-holder in Seawall. Essentially, the Trustee asks this Court to

look at the substance, and not the form, of ownership and to determine Bell's ownership rights as of 1979.[9]

The Trustee's position, however, is contrary to well-settled principles of law. It "is elementary that a corporation is a legal entity entirely separate and distinct from the shareholders or members who compose it." *Cheatle v. Rudd's Swimming Pool Supply Co., Inc.*, 234 Va. 207, 212, 360 S.E.2d 828, 831 (1987). In *Bogese. Inc. v. State Highway and Transp. Comm'r*, 250 Va. 226, 462 S.E.2d 345 (1995), we considered whether, under the unity of lands doctrine, unity of ownership existed when a corporation owned one parcel of land and a general partnership, whose partners were the same individuals as the corporate shareholders, owned the adjacent parcel. In holding that unity of ownership did not exist and that two distinct entities owned the two parcels, we stated that "where persons have deliberately adopted the corporate form to secure its advantages, they will not be allowed to disregard the existence of the corporate entity when it is to their benefit to do so." *Id.* at 230, 462 S.E.2d at 347 (quoting *Board of Transp. v. Martin*, 249 S.E.2d 390, 396 (N.C.1978)). Thus, we recognized that only " 'an extraordinary exception' will justify piercing the corporate veil." *Id.* at 230, 462 S.E.2d at 348 (quoting *Cheatle*, 234 Va. at 212, 360 S.E.2d at 831).

Accordingly, Bell, who accepted the benefits of corporate ownership, cannot avoid its disadvantages. Seawall's acquisition of lots 21 and 22 in 1979 does not protect Bell or the Trustee from the restrictions of the Ordinance. Any rights that Seawall acquired in lots 21 and 22 belonged solely to Seawall as

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[9] Again, we assume, without deciding, that the Trustee can assert whatever rights Bell, as one of the grantors of the Bell Land Trust, has.

Seawall was an entity distinct and separate from Bell.[10] Thus, Bell's ownership rights in lots 21 and 22 must be defined as of 1982, not 1979. Since the Ordinance pre-dated Bell's acquisition of lots 21 and 22, Bell, and now the Trustee, took the property subject to the Ordinance's restrictions.

Our decision that neither Bell's nor the Trustee's ownership rights include the right to develop the property free from regulatory restrictions is in accord with *Prince William County v. Omni Homes. Inc.*, 253 Va. 59, 481 S.E.2d 460, *cert. denied*, —U.S.—, 118 S.Ct. 58 (1997). In that case, *Omni* purchased a parcel of unimproved land, which was adjacent to another undeveloped parcel, with the intent of building an urban residential development. Since the development of *Omni*'s subdivision would require obtaining road and utility access, *Omni* secured an informal agreement with the adjacent landowners to gain such access through the adjoining parcel. However, *Prince William County* subsequently purchased the adjoining tract, thwarting *Omni*'s plans to obtain road and utility access through the adjacent property. *Omni* therefore brought suit, and the trial court ruled that the county's purchase of the adjoining tract was a regulatory action that constituted a taking in violation of the Fifth Amendment of the United States Constitution and Article I, § 11 of the Constitution of Virginia.

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[10] The mere dissolution of Seawall did not effect a transfer in title to its property. Code § 13.1-745(B)(1). Furthermore, "[t]he termination of corporate existence shall not take away or impair any remedy available to the corporation . . . for any right or claim existing prior to such termination. Any such action or proceeding by . . . the corporation may be prosecuted . . . by the corporation in its corporate name." Code § 13.1-755. Finally, any right Seawall may have had to compensation for a regulatory taking would not have passed to Bell or the Trustee. See *Riddock v. City of Helena*, 687 P.2d 1386, 1388 (Mont.1984) (holding that "the right to compensation for a taking is a personal right which does not pass to a successor with the transfer of land").

This Court reversed, holding that the county's purchase of the adjoining tract was not a taking. We stated that *Omni* had not "lost the right to develop its property." *Id.* at 72, 481 S.E.2d at 467. Rather, *Omni* "had not acquired the rights necessary to realize its preferred method of development either as a matter of contract or easement." *Id.* Accordingly, the county's action did not affect *Omni*'s property rights since *Omni*, at the time of the county's purchase, had no right of access through the adjacent property. Thus, since the county could not damage a nonexistent right, the purchase was not an uncompensated taking under either the United States or Virginia Constitutions.

Like the property owners in *Omni*, neither Bell nor the Trustee acquired the right to develop lots 21 and 22 free of the Ordinance's restrictions. Rather, the restriction on the lots was in the chain of title at the time of Bell's acquisition and likewise when Bell and his wife deeded the property to the Bell Land Trust. Thus, Bell, and now the Trustee, acquired the property with full knowledge of the risk involved in attempting to develop it. "One who buys with knowledge of a restraint must assume the risk of economic loss." *Omni*, 253 Va. at 69, 481 S.E.2d at 465.

For these reasons, we hold that the denial of Bell's permit was not a regulatory taking for which the City owes compensation to the Trustee. Accordingly, we will reverse the judgment of the circuit court and enter final judgment here for the City.[11]

Reversed and final judgment.

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[11] The City also assigned error to the trial court's failure to dismiss the instant action on the basis of res judicata and in admitting evidence regarding the value of lots 21 and 22. Because we find that the denial of a permit under the Ordinance does not constitute a taking for which the City owes compensation, we do not address the City's additional assignments of error.

Filed 2/28/97

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

RICHARDSON C. BELL, Trustee for Bell Land Trust, the Plaintiff,	)	LAW NO. CL-94-996
v.	)	
CITY OF VIRGINIA BEACH, Defendant.	)	

JUDGMENT ORDER

This matter came to be heard on January 7, 1997. Thereupon came the parties, in person and by counsel, and also came a jury, to wit: Michael B. Miller, Linda L. Levesque, Michael E. Kinne, Anna H. Holmes, Mary S. Zabala, Martha R. Thompson and Rosemary H. Salem, who were sworn to well and truly try the issue joined and a true verdict render according to the evidence and the law.

On January 7, 1997, the evidence of the Plaintiff was presented and the Plaintiff rested. AT the conclusion of the Plaintiff's evidence, the defense made a motion to strike, which motion was denied and exception noted. At the end of the day, the Court adjourned.

On January 8, 1997, the Court reconvened and with the parties, in person and by counsel, and the above-named jurors present, the defense presented its evidence. Following presentation of the defense evidence, the Court, with the parties, counsel, and the above-named jurors present, conducted a view of the property in issue in the case. Upon return to court, the defense rested. The Defendant renewed its motion to strike Plaintiff's evidence at the close of all evidence, and the Court denied this

motion. Defendant's exception to this ruling was noted. After receiving instructions from the Court and hearing arguments of counsel, the jury retired to the jury room to consider their verdict, and after some time returned in to the Court with the following verdict: to-wit: We, the jury, find for the Plaintiff and fix his damages at $110,000, plus interest running from November 3, 1993. Thereafter the Court adjourned.

It is hereby ADJUDGED and ORDERED that the judgment be, and it hereby is, entered for the Plaintiff against the Defendant in the amount of $110,000, with prejudgment interest thereon at the rate specified in Va. Code § 6.1-330.54 from November 3, 1993, to January 8, 1997, for a total amount of **$141,517.00,** plus additional prejudgment interest at the rate of $27.12 per day for each day between January 8, 1997 and the date of entry of this Order, plus costs. This judgment shall bear post-judgment interest at the rate specified in Va. Code § 6.1-330.54 from the date of this ORDER until paid.

ENTERED this 28 day of February, 1997.

/s/ Edward W. Hensey
Judge

SEEN AND AGREED:

/s/ Patrick A. Genzler
Counsel for Plaintiff

Seen and objected to for reasons argued and briefed to the court

/s/ Richard J. Beaver
Counsel for Defendant

Supreme Court, U.S.
FILED
AUG 7 1998
OFFICE OF THE CLERK

No. 97-2061

In The

Supreme Court of the United States

October Term, 1997

RICHARDSON C. BELL, Trustee for Bell Land Trust,

Petitioner,

vs.

CITY OF VIRGINIA BEACH,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to grant a Writ of Certiorari to consider argument and theory neither raised nor addressed below?

2. Should the Court exercise its discretion to grant a Writ of Certiorari solely to determine whether the Supreme Court of Virginia misapplied the "bundle of rights" doctrine, after correctly stating the doctrine?

3. Considered in light of all of the facts of this case, was the Supreme Court of Virginia plainly wrong in its interpretation and application of the law of regulatory taking as determined in *Lucas v. South Carolina Coastal Council*?

4. Should this Court exercise its discretion to grant a Writ of Certiorari to review a decision of the Virginia Supreme Court on what is actually a narrow issue of state property rights law?

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STATEMENT OF JURISDICTION

In accordance with 28 U.S.C. § 1257(a), this Court cannot properly exercise jurisdiction over this case. Bell's "Questions Presented" are based upon legal theories never presented to or raised by the Virginia courts. Furthermore, Bell's challenge to the Virginia Supreme Court's decision as either plainly erroneous or the misapplication of the properly-stated rule of *Lucas* does not state a basis for the discretionary exercise of jurisdiction under Rule 10.

CONSTITUTIONAL PROVISION INVOLVED

This case involves application of the just compensation clause of the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Introduction

Richardson Bell, as trustee, sued the City of Virginia Beach for inverse condemnation of lots 21 and 22 of the Chesapeake Park subdivision because a permit required by the Virginia Coastal Primary Sand Dune Protection Act was not granted. The trial court submitted the case to the jury which returned a verdict in favor of Bell for $110,000, plus interest, as compensation for lots 21 and 22. After post judgment motions, the trial court entered its final judgment order on February 28, 1997. On February 27, 1998, the Virginia Supreme Court reversed the judgment of the trial court.[1]

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1. *City of Virginia Beach v. Bell*, 255 Va. 395, 498 S.E. 2d 414 (1998).

B. Statement of Facts

Seawall Enterprises was a corporation owned by Richardson Bell and William L. Page. In 1979 Seawall purchased lots 21 and 22 of the subdivision of Chesapeake Park and four other, similar, lots for $10,000. The lots are seaward of the primary coastal dune on the shore of Chesapeake Bay, at the northern boundary of the City of Virginia Beach.

In 1979 Seawall submitted a plan to the City to develop lots 21 and 22; approval was denied because of "the six foot contour" rule. Seawall submitted at least one other proposal, which was also not approved by the City.

* * *

The Coastal Primary Sand Dune Protection Act[2] became law in 1980. The Act is intended to prevent the destruction of coastal primary sand dunes and beaches. It was enacted in recognition of the damage to the health, safety and welfare of the community that results when the community's natural protective barriers to the sea are weakened or destroyed. The Act declares that it is

> the public policy of the Commonwealth whenever reasonably necessary to preserve and protect coastal primary sand dunes and to prevent their despoliation and destruction and whenever practical to accommodate necessary economic development in a manner consistent with the protection of such features.

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2. Originally codified in Virginia Code Chapter 2.2 of Title 62.1. References are to the sections in effect at the time the Bells' permit application was considered. The Act is now recodified in Chapter 14 of Title 28.2 (Virginia Code §§ 28.2-1400 *et seq.*).

The Act includes a model ordinance, which the City has adopted.[3] Any person who wishes to use or alter a coastal primary sand dune or beach is required to first get a permit under the ordinance. The standards to be applied in considering applications for permits to use coastal primary sand dunes prohibit any permanent alteration of or construction on such dunes that would:

> (i) impair the natural functions of the dune as described herein; (ii) physically alter the contour of the dune; or (iii) destroy vegetation growing thereon unless the wetlands board, or in its absence the Commission, determines that there will be no significant adverse ecological impact, or that the granting of a permit hereunder is clearly necessary and consistent with the public interest considering all material factors.[4]

A local wetlands board is required to base its decision on:

> (1) Such matters raised through the testimony of any person in support of or in rebuttal to the permit application.
>
> (2) Impact of the development on the public health and welfare as expressed by the policy and standards of [the Act] and any guidelines which may have been promulgated thereunder by the Commission.[5]

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3. Virginia Code § 62.1-13.25; Virginia Beach City Code Appendix A — Zoning, Article 16.

4. Virginia Code § 62.1-13.23; City Code Appendix A § 1608.

5. Virginia Code § 62.1-13.25 (9A).

The decision of the local board is reviewable on the record by the Virginia Marine Resources Commission.[6] The decision of the Commission is appealable to the circuit court in accordance with the state Administrative Process Act.[7] The circuit court's role in an appeal is "equivalent to an appellate court's role in an appeal from a trial court."[8]

* * *

In 1982 the corporation dissolved, and Richardson Bell and his wife Linda became the owners of lots 21 and 22. That year the Bells submitted their first plan of development, which was disapproved.

In 1992 the Bells prepared the plan of development for lots 21 and 22 that is the subject of this lawsuit, and applied to the City for the necessary approval. The plan sought to turn lots 21 and 22 into a residential building lot. Because most of this property is located seaward of the dune line, and 15 feet are actually in the intertidal zone, the Bells proposed to literally create a home site from scratch by building and filling a three-sided bulkhead.

When the City determined that the plan involved disturbing the coastal primary sand dune, the application was referred to the Virginia Beach Wetlands Board for approval of the permit required by the Coastal Primary Sand Dune Protection Act. The Board convened, heard evidence, and determined that the

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6. Virginia Code §§ 62.1-13.27, 62.1-13.11, 62.1-13.12 and 62.1-13.13.

7. Virginia Code § 62.1-13.15.

8. *School Board of York County v. Nicely*, 12 Va. App. 1051, 1062, 408 S.E. 2d 545 (1991).

permit should not be granted. The Bells appealed the Board's decision to the Virginia Marine Resources Commission.

The decision of the wetlands board was upheld by the Marine Resources Commission. The Bells appealed to the circuit court which, in a decision that was not appealed, affirmed the conclusion of the Marine Resources Commission that the requested permit should not be granted.

In 1993 the Bells divorced, and lots 21 and 22 were transferred to the "Bell Land Trust," and a third party was named trustee. Bell later became the trustee, and filed the underlying suit on March 29, 1994.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION TO CONSIDER THE QUESTIONS PRESENTED BY BELL'S PETITION BECAUSE THEY WERE NEITHER RAISED BEFORE NOR ADDRESSED BY THE VIRGINIA SUPREME COURT.

In reviewing decisions of state courts under 28 U.S.C. § 1257 the Court will not consider claims neither raised nor addressed below.[9]

Bell bases his Petition on "three distinct legal and logical errors" — none of which was raised or argued before the Virginia Supreme Court: Bell now contends that the passage of a permitting requirement is not, without more, a regulatory

9. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992). *See also Beck v. Washington*, 369 U.S. 541, 549-53 (1962) (because petitioner failed to argue equal protection in state court, question was not before this Court).

taking. Second, Bell now asserts that the complained-of-interpretation of the Virginia Supreme Court will enable Virginia localities to avoid the "mandatory" compensation remedy for regulatory takings. And finally, Bell now complains that the application of *Lucas* did not correctly address that decision's incorporation of the "background principles of property law."

Instead, before the court below, Bell, in response to the City's assertion that his "bundle of rights" did not include the right to unfettered development of the property, argued only that he as trustee and he and his wife as former owners were essentially the same entity as the predecessor corporate — owner because Bell had been a shareholder of that corporation.[10] The failure of both Bell and the Supreme Court of Virginia to address Bell's now-extensive theories and arguments places the case outside of this Court's purview. Bell shouldn't be able to circumvent this jurisdictional defect by extensive argument, and citation to dozens of decisions, raised now for the first time.

II.

BELL'S "QUESTIONS PRESENTED," SUGGESTING THE MISAPPLICATION OF LAW BY THE VIRGINIA SUPREME COURT, DO NOT STATE ANY BASES UPON WHICH THE COURT SHOULD EXERCISE ITS DISCRETION TO GRANT A WRIT OF CERTIORARI.

In accordance with Rule 10, this Court does not normally grant a writ of certiorari when the asserted error is the misapplication of a properly stated rule of law. Bell's arguments fall into this category. The Virginia Supreme Court stated the applicable language of *Lucas*:

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10. Brief of Appellee to Virginia Supreme Court at 17.

> However, in *Lucas* the Court also recognized that not all categorical takings are compensable. The Court declared that a state may "resist compensation" even in categorical takings, if an "inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. Thus, a property owner may seek compensation for a categorical taking only when the state is exercising power over the 'bundle of rights' that the owner acquired when first obtaining title to the property. *Id.*[11]

The Virginia Supreme Court applied this rule to conclude that the Bells' "bundle of rights" in the property did not include the unfettered right to develop it as a residential building lot. Bell takes issue with this conclusion and argues that the Supreme Court of Virginia should have applied the rule differently. This argument — that of misapplication of a properly stated rule — does not merit the exercise of this Court's discretionary jurisdiction under Rule 10. Alternatively, it is an argument that the Virginia Supreme Court's decision is erroneous, which is also not a reason for this Court to grant a writ of certiorari.[12]

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11. *Bell, supra*, 255 Va. at 400, 498 S.E. 2d at 417, Ap. A-5, 6 of Petition for Certiorari.

12. *Ross v. Moffit*, 417 U.S. 600, 616-17 (1974).

III.

THE VIRGINIA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH THE DECISION IN *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL.*

The factual differences between *Lucas* and this case are significant — and critical. Lucas paid $975,000 to purchase two ready-to-build-on lots, only to have state action, within two years thereafter, flatly ban any building on either of the lots. The Bells, on the other hand, acceded to ownership of two adjoining lots seaward of the dune and in the surf, which had been acquired three years earlier for $3,333, and for which permits to develop had been rejected twice before the passage of the regulating dune statute and ordinance — which also predated Bells' ownership. The Bells' property was never ready-to-build-on in its natural state, as their proposed development plan confirms, and when they acquired it, was subject to the state action. In addition, the Act and ordinance governing the Bell property provided for a hearing, standards governing what might be permitted and the competing interests that must be considered, and the opportunity to resubmit another plan for development.

Under all of the facts of this case, the decision of the Virginia Supreme Court is consistent with *Lucas*. The Bell property was not developable before the dune act and ordinance, and therefore there was no reasonable expectation of development.

The unfettered right to disturb the coastal primary sand dune did not exist when the Bells acquired the property two years after the Act became law. Nor was there in place any permit or plan that would vest such rights in the land. And when the Act became law, it did not appropriate private

property for public use but provided for regulation of the use of property by its owners.

IV.

THE PROCLAIMED CONFLICT IN DECISIONS IS ILLUSORY.

The Virginia Supreme Court decision does not, as Bell asserts, pronounce that Virginia property owners cannot pursue inverse condemnation litigation for claimed regulatory takings. The decision instead says that, in the limited context of this case, under Virginia property law and the constitution as applied by *Lucas*, the regulatory action taken by the City of Virginia Beach under the Virginia Coastal Primary Sand Dune Protection Act was not an unconstitutional taking of property from the Bells. The Bells acquired the property subject to the Act. All of the provisions of that Act were followed, resulting in a final judicial review and decision affirming the regulatory action and the denial of the permit. (This result does not preclude Bell from reapplying for a permit with another development plan.) Had the permit-denial been found to be unconstitutional (that is, a taking), it would have been overruled.

In their appeal to the circuit court of the denial of the permit by the Marine Resources Commission, the Bells had the opportunity to — and did — raise the panoply of issues relevant to their property and its regulation by the Act. These issues include:

> (I) accordance with constitutional right, power, privilege, or immunity, (ii) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be

> made, and the factual showing respecting violations or entitlement in connection with case decisions, (iii) observance of required procedure where any failure therein is not mere harmless error, and (iv) the substantiality of the evidential support for findings of fact.[13]

Thus, the regulation of the coastal primary dune and beach was carried out as contemplated by the legislature, and reviewed by the circuit court. The Bells had their day in court with respect to the specific development plan submitted and the permit applied for. They acquired the property subject to the Act and were afforded all of their rights in accordance with the Act.

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13. Administrative Process Act, Virginia Code § 9-6.14:17, Issues on Review.

CONCLUSION

The Virginia Supreme Court's decision in this case not only correctly applies *Lucas* in such a state regulatory scheme, but also demonstrates its validity and vitality.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1997

RICHARDSON C. BELL, Trustee for Bell Land Trust
Petitioner,

v.

CITY OF VIRGINIA BEACH,
Respondent.

On Petition for Writ of Certiorari to Supreme Court of Virginia

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Richardson C. Bell, Trustee for the Bell Land Trust (Bell), respectfully files this reply to the City of Virginia Beach's opposition to Bell's petition for writ of certiorari.

INTRODUCTION

Respondent, the City of Virginia Beach (City), has filed an opposition to Bell's petition for a writ of certiorari that (1) attempts to deny that Bell raised a regulatory takings claim in the courts below that would allow Bell to elaborate in his petition on the theory of regulatory takings, (2) suggests that the court below merely applied a correctly stated rule of law, (3) argues that *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), can be distinguished because David Lucas' lots were more valuable, and (4) claims that there is no conflict with other jurisdictions because Bell's takings claims were brought in the wrong forum in Virginia. While the weakness of these arguments is self-evident, several points merit this reply.

I

THIS COURT HAS JURISDICTION OVER THE TAKINGS ISSUE

A. The Takings Issue Was Properly Raised Below

This is a regulatory takings case. This case has always been a regulatory takings case. From the filing of the complaint through the appeal to the Virginia Supreme Court Bell has alleged and has argued that the application of Virginia Beach's dune regulation to the Bell Trust's property has taken that property without the payment of just compensation. Yet the City suggests that, in the court below, Bell "argued only that he as trustee and he and his wife as former owners were essentially the same entity as the predecessor corporate—owner because Bell had been a shareholder of that corporation." Respondent's Brief in Opposition at 6 (citing Bell's Brief of Appellee to the Virginia Supreme Court at 17).

How can this be? How can Bell have argued "only" about ownership issues when, after dispensing with certain procedural issues, Bell titles the first substantive argument to the Virginia Supreme Court this way: "The City's denial of a permit under the Coastal Primary Sand Dune Zoning Ordinance was a regulatory taking of Bell's property since it deprived him of all economically beneficial use of his property." Appellee's Brief at 14. How can Bell have not argued the takings issue when the next subheading suggests: "The denial of a Dune Ordinance permit by the City's Wetlands Board was a categorical taking." *Id.* at 15. How can Bell have waived the takings issue when he proceeds to discuss the applicability of this Court's decision in *Lucas v. South Carolina Coastal Commission*, 505 U.S. at 1019? Appellee's Brief at 15-16. How can it be improper to discuss takings theory now when Bell discussed below the alleged so-called "harmful or noxious uses" exception to the Takings Clause and Bell's "reasonable expectations" that the Trust could use the lot for residential development? *Id.* at 16.

How can the City pretend to be caught somehow unaware of the takings issue when its brief to the Virginia Supreme Court devotes eight pages to refuting the trial court's determination that there had been a regulatory taking? Brief of Appellant to the Virginia Supreme Court at 12-20. Finally, the court below devoted virtually its entire opinion to the subject of regulatory takings? *See* Petitioner's Appendix A, *passim*.

The City's argument invites astonishment. However, a review of the record will quickly dispel any vestiges of credibility that the City's argument may retain.

B. It Is Appropriate to Raise a New Legal Theory or, in Fact, "Any Argument Petitioner Likes" in Support of a Properly Pled Cause of Action

The City also suggests that Bell should be confined in his petition to raising only the same arguments that were made below in support of his takings claim. Respondent's Brief in

Opposition at 5. The City points out, correctly, that the petition elaborates on regulatory takings theory in more detail than Bell utilized below. *Id.* at 5-6. The City argues that this is improper, citing to *Yee v. City of Escondido*, 503 U.S. 519 (1992), for the proposition that this Court will not consider claims neither raised nor addressed below. The City apparently ignores the distinction in *Yee* between "claims" and "arguments" in support of claims.

The problem in *Yee* was that Yee attempted to raise a ***regulatory taking claim*** at the merits stage when such a claim was not part of the questions presented. *Yee*, 505 U.S. at 520. At the time this Court granted review the only taking issue that was properly before it was the claim for a ***physical invasion***. *Id.* at 520-21. This Court was not willing to entertain the entirely new regulatory taking claim on the merits stage that was not found in the questions presented.

This case, however, bears none of the baggage of *Yee*. Apart from the fact that we are only at the petition stage at this point, the regulatory takings claim at issue in this petition has been the central theme of this case since the day the complaint was filed. The claim is quite properly in the questions presented. And, because all of Bell's legal analysis in his petition is in support of this very same ***claim***, Bell's regulatory takings arguments are entirely appropriate at the petition stage. As this Court said in *Yee*, referring to arguments at the merits stage,

> once petitioners properly raised a taking claim, they could have formulated, in this Court, any argument they liked in support of that claim.

Id. at 520. In order to demonstrate the conflicts that exist between the decision of the Virginia Supreme Court and other appellate jurisdictions, Bell quite naturally elaborated on the meaning of a regulatory taking. To suggest, instead, that this elaboration constituted a new set of "claims" or that Bell must be

confined to making the same precise arguments made below is not credible.[1]

II

THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI BECAUSE, AMONG OTHER REASONS, THE COURT BELOW MISINTERPRETED THE TAKINGS CLAUSE IN A MANNER THAT IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER APPELLATE JURISDICTIONS

The City suggests that Bell's petition is simply about an alleged "misapplication of a properly stated rule of law" that does not warrant review under this Court's Rule 10. Respondent's Brief in Opposition at 6. To support this argument, the City proceeds to quote three sentences from the Virginia Supreme Court's decision below that focus on *Lucas*. *Id.* at 6-7. The City next says that the court below merely applied its understanding of *Lucas* that is embodied in these three sentences and that this Court should therefore deny Bell's petition. *Id.* at 7. The City's logic is elusive. Perhaps the City is suggesting that three sentences of reasonably correct analysis somehow insulate from review every other legal error in the opinion—even when those errors are in conflict with opinions of this and other

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[1] The City also cites to *Beck v. Washington*, 369 U.S. 541, 549-53 (1962), in support of its argument that this Court will not consider new claims. Respondent's Brief in Opposition at 5 n.9. *Beck* involved a constitutional attack on a criminal statute that was not properly raised at the trial court level or in the "assignments of error" at the appellate level in accordance with Washington State procedures. *Id.* at 551-52. With the constitutional claims not properly before or addressed by the Washington appellate court, they were not properly before this Court. *Id.* at 553. Nor were they found in the questions presented in the Petition for Writ of Certiorari. *Id.* at 554. None of this has the slightest resemblance or relevance to Bell's case.

courts. Perhaps the City is suggesting that the entire opinion revolves around these three sentences and that there are no other legal conclusions, erroneous or otherwise, in the opinion. In either case, the City is wrong.

Bell's petition asks, among other things, whether a city can avoid the obligation under the Takings Clause to pay just compensation merely because a property owner acquired a parcel of real property after the enactment of an ordinance whose subsequent application deprived that parcel of all economically viable use. The Virginia Supreme Court essentially said "yes" and held that "a subsequent regulation directly affected the property owner's 'bundle of rights' which, at the time of their purchase, included the right to develop their property freely." Petitioner's Appendix at A-6. This holding of the Virginia Supreme Court is not a mere application of *Lucas*. It is a unique rule of law created by the Virginia court. The Virginia Supreme Court first announced a rule of law and then applied the holding in *Lucas* to that rule of law. It is the rule of law announced by the state court that is presented for review, not the application of the *Lucas* decision to that rule of law. It is, as explained in Bell's petition, a rule of law that is in conflict with the United States Constitution, the holdings of this Court, and the holdings of numerous other appellate courts. That the Virginia court thought that *Lucas* is compatible with its erroneous rule of law does not make it so. The decision below is not a simple and unreviewable application of *Lucas*. It is a serious misinterpretation of the Constitution and the holdings of this Court. As explained in Bell's petition, it is in serious conflict with the holdings of many other appellate jurisdictions. It is reviewable by this Court.[2]

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[2] The City's citation to *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974), is equally unavailing. *Ross* concerned whether a criminal defendant must be provided appointed counsel for assistance in preparing a petition for certiorari to this Court. One sentence of the opinion is

(continued...)

III

THAT DAVID LUCAS' PROPERTY WAS MORE VALUABLE THAN THE BELL'S IS UNINTERESTING AND IRRELEVANT

The City notes that David Lucas paid $975,000 for his two lots and claims that a predecessor to the Bells obtained two lots for $3,333. Respondent's Brief in Opposition at 8.[3] The city also suggests that there is some relevance to the fact that Lucas' lots were "ready to build" and Bell's supposedly were not. *Id.* at 8. Without citation to an inexpensive lot exception to the Takings Clause, the relevance of this passage is enigmatic at best.

Without citation, the City also claims that Bell's lots "were not developable before the dune act." *Id.* But that was never the holding of the Virginia Marine Resources Commission (the state administrative agency that denied Bell's appeal of its permit application denial), the trial court, or the Virginia Supreme Court.[4] And, of course, the City neglects to mention that there had been a home on the property in 1975. State's Appellate Appendix at 88. Although it was never as grand as David

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[2] (...continued)
arguably relevant when this Court said that its review "is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Id.* at 617. This is quite unremarkable and quite unhelpful in the case of Bell's petition as that petition addresses much more than the "correctness of the judgment."

[3] For what it's worth, the City also admits that these and other lots were acquired for $10,000 in 1979. *Id.* at 2.

[4] In fact, the uncontroverted testimony at trial was that other lots identically situated to Bell's had been developed before and after Bell's acquisition (Virginia Supreme Court Appendix (App.) at 15-16, 18, 20, 23-24, 106-08) and that the lots were buildable (App. at 68-69, 111-14).

Lucas' land. Bell had a valuable property interest and every reasonable expectation to be able to replace the home that had been removed four years before Bell's predecessor purchased the land.

IV

BELL'S TAKINGS CLAIM IS RIPE

The City's final argument recites the fact that Bell properly exhausted all administrative procedures in appealing the denial of his permit application. As the City so succinctly says: "All of the provisions of that Act were followed, resulting in a final judicial review and decision affirming the regulatory action and the denial of the permit." Respondent's Brief in Opposition at 9. The City argues that Bell was in error in filing a subsequent takings claim in trial court; that Bell should have filed that action as part of the appeal of the administrative decision. *Id.*

The question of whether Bell filed his taking claim in the proper state court is a matter involving an interpretation of Virginia's rules of procedure; it is not a federal question. In any event, the City made virtually the identical argument to the Virginia Supreme Court when it claimed that the trial court was without jurisdiction because the decision of the Virginia Marine Resources Commission and the circuit court (that heard the appeal of the permit denial) was res judicata on all issues—including the takings claims. Brief of Appellant before the Virginia Supreme Court at 9-12. The Virginia Supreme Court, however, decided that it did not need to address this contention. Appellant's Appendix at A-10, n. 11. Because the City did not frame this issue as a federal question in a cross-petition, neither should this Court.

In fact, the only significance of the fact that Bell obtained "final judicial review" of the permit denial is that this makes it clear that Bell "obtained a final decision regarding the application of the regulations to the property at issue" as required by

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985).[5]

CONCLUSION

Perhaps the City recognizes that as a matter of statistics this Court grants few petitions for writ of certiorari and therefore the City need not take Bell's petition very seriously. Bell, however, takes it very seriously. Bell has been denied the right to make any reasonable use of two valuable lots on the Chesapeake Bay. The trial court found that there had been a taking and awarded damages. The Virginia Supreme Court reversed because the property had been acquired after the dune regulations were enacted. The court failed to recognize that it was the application of the regulation that led to the taking, not their mere passage. As Bell's petition explains, the appellate courts of numerous state and federal jurisdictions are in conflict with the Virginia Supreme Court's decision and with each other. There is no prevailing theory on how courts should approach as-applied regulatory takings when the regulation is applied after regulated property is acquired. If other jurisdictions, however, look to Virginia (and New York) for guidance, then landowners across the Nation will lose completely the constitutionally guaranteed right of just compensation.

Nothing that the City has said diminishes in any way the force of Bell's arguments or the conflicts created by the decision below.

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[5] In fact, by exhausting all administrative decisions and even obtaining judicial review of the agency action, Bell arguably did more than obtain a final agency decision required under *Williamson County*.

For these reasons, Bell's petition for writ of certiorari should be granted.

DATED: August, 1998.

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